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No. 84-1786

In The

Supreme Court of the United States

October Term, 1984

WELENKEN HIMMELFARB AND CO.
WHAYNE HOUGLAND,
Petitioners,

vs.

JULIA V. SPARROW HOLT (ATCHISON)
ON BEHALF OF HERSELF AND
ALL OTHERS SIMILARLY SITUATED,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENTS, JULIA V. SPARROW HOLT (ATCHISON) AND ALL OTHERS SIMILARLY SITUATED, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

Is the decision of the Sixth Circuit consistent with the guidance established by this Court in *Link v. Wabash R.R. Co.*, 370 U.S. 626 (1962) with regard to dismissals under Federal Rule of Civil Procedure 41(b)?

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JURISDICTION

Respondents do not believe that any of the considerations under Rule 17 of the Supreme Court have been met.

The Circuits are not in conflict concerning the standard for dismissal under Federal Rule of Civil Procedure 41(b).

Moreover, the Sixth Circuit correctly applied the rulings of this Court and no important question of federal law is presented by the Petition.

The Petition before the Court does not present a question which warrants discretionary review.

STATEMENT OF THE CASE

This is a securities law case brought under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j (the "1934 Act") and Rule 10b-5, 17 C.F.R. 240.10b-5, promulgated thereunder.

The plaintiff filed her class action complaint on February 2, 1973, alleging serious violations of the federal securities laws on the part of the defendants involving the offer and sale of shares of two corporations, Z-Industries, Inc. ("Z") and Modfac Industries, Inc. ("MODFAC") to some one thousand Kentucky investors.[1] After an initial round of discovery consisting of interrogatories, discussions with various parties, and examination of relevant documents, a number of defendants, by order of the district court, were both dropped and added, and the plaintiff was granted permission to file a first amended com-

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1 The original complaint dated February 2, 1973, paragraphs 14-20 of Count II, at 10-22, outlined the factual basis for the Section 10(b) and Rule 10b-5 violations. The prospectus contains too many untrue statements to examine in detail for our purposes here. It is sufficient to point out that they included misrepresentations as to how the proceeds of the stock offer were to be used, the nature of the issuer's businesses, and gross errors in depicting the financial status of the issuer.

plaint making the claims correspond to the facts then available to plaintiff's counsel. The first amended complaint was filed on November 20, 1973. The cause of action arose out of the statements in a prospectus dated October 17, 1969, regarding a stock sale of four hundred thousand shares of Z Industries stock at Five Dollars per share.[2] The securities became worthless and the plaintiff on behalf of the class of purchasers sought relief for a Two Million Dollar ($2,000,000) loss, interest, and costs.[3]

After months of motion practice, the first pretrial conference was held July 2, 1974, at which time Judge Bratcher made several rulings. There followed again many months of discovery activity.

On March 22, 1976, the plaintiff renewed her motion that the action be allowed to proceed as a class action. On September 7, 1976, Judge Bratcher upheld the motion of plaintiff for class action certification with certain exceptions. The class action notice was dated October 7, 1976, and was subsequently mailed to the members of the class.

More discovery ensued including interrogatories propounded to plaintiff by defendant, Whayne M. Hougland, on November 10, 1976. Most of 1977 was taken up by a third party complaint tendered by Warner and Zumbeil on February 22, 1977. No activity occurred in 1978.

In 1979 the case again became quite active. On May 22, 1979, the case was transferred to Judge Allen follow-

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[2] See Counts III-VIII of the first amended complaint dated September 28, 1973, at 30-36.

[3] See the first amended complaint dated September 28, 1973, at 50, 51.

ing the death of Judge Bratcher. A pretrial conference took place on June 4, 1979. A June 6, 1979, order regarding the pretrial conference was entered by Judge Allen in which he took several actions including striking Paul D. Gudgel[4] as counsel for plaintiff and substituting J. Montjoy Trimble.

It was approximately at this time that counsel for Hougland and other defendants renewed attempts to have the class decertified and a motion was filed to this effect on June 18, 1979. On June 11, 1979, a deposition of the plaintiff was taken by the defendants. On July 5, 1979, plaintiff filed a memorandum in opposition to defendants' motion to decertify the case as a class action. A hearing was held on September 18, 1979, before Judge Allen at which time the parties attended to discuss the status of the case. On November 30, 1979, Judge Allen entered an order overruling defendants' motion to decertify the class.

The year 1980 was taken up by various motions regarding appearances and withdrawal of counsel and by notice of depositions filed by the plaintiff.

In 1981 the plaintiff attempted to continue with some discovery and filed additional deposition notices.

In 1982 more discovery followed. The plaintiff took the deposition of defendant, Phillip G. Hershberger, in June 1982. On November 23, 1982, plaintiff filed answers to interrogatories propounded by defendant, Welenken Himmelfarb and Company.

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[4] Paul D. Gudgel had been elected to the bench in Kentucky and is now a judge of the Kentucky Court of Appeals.

No action was taken in 1983 until December 8, 1983, when Judge Allen entered a show cause order *sua sponte* commanding the plaintiff to give a full status report on the case and directing plaintiff to show cause why the case should not be dismissed for lack of prosecution.

The plaintiff responded promptly to the show cause order by filing a memorandum status report with affidavits from counsel, J. Montjoy Trimble and Charles L. Calk. Counsel submitted representations that discovery could begin to be completed in March of 1984 and that they were ready to go to trial as soon as possible thereafter.

In January of 1984 replies to plaintiff's response to the show cause order were filed by defendants Welenken, Hougland, and Hershberger. A motion to decertify the class was filed on January 6, 1984, by defendant Hougland.

On February 24, 1984, Judge Allen entered a Judgment and Memorandum Opinion in which the case was dismissed for lack of prosecution and the class decertified. In the Memorandum Opinion the district court concluded that the plaintiff had not been diligent in prosecution of the action. The court used the analysis of *Citizens Utilities Co. v. American Telephone and Telegraph Co.*, 595 F.2d 1171 (9th Cir. 1979), *cert. denied*, 444 U.S. 931 (1979) and the authority contained in Federal Rule of Civil Procedure 41(b) as a basis for its dismissal and decertification. The court conducted a comprehensive review of the procedural history of the case and concluded that the plaintiff was responsible for four (4) years and ten (10) months of the delay in the eleven (11) years of litigation. The court specifically found no actual prejudice to the defendants (Mem. Op. at p. 9) but

noted its awareness of the principal that prejudice may be presumed from unreasonable delays. *Alexander v. Pacific Maritime Association,* 434 F.2d 281 (9th Cir. 1970), *cert. denied,* 401 U.S. 1009 (1971). Judge Allen also decertified the case as a class action based on his finding that the plaintiff had not been diligent in the prosecution of the case.

In an Opinion filed February 11, 1985, the Sixth Circuit reversed the decision of the district court and remanded the case for further proceedings. It should be noted that counsel for the Respondents moved for a pretrial conference and scheduled depositions subsequent to the issuance of the Sixth Circuit's mandate. Both of these actions have now been stayed pending this Court's review.

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REASONS FOR DENYING THE WRIT

Rule 17 of the Court's Rules provides that a review of a petition for a writ of certiorari is discretionary and will be granted only when there are special and important reasons therefor. Such reasons include the following:

(1) A federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter;

(2) A federal court of appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision;

(3) A federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court;

(4) A federal court of appeals has decided a Federal question in a way in conflict with applicable decisions of this Court.

In the fact pattern before this Court none of the foregoing reasons exist.

Judge Merritt, writing for the three judge panel of the Sixth Circuit Court of Appeals, recognized that the district court was faced with a difficult decision based upon competing equities. He observed that the district court considered several factors including the plaintiffs' lack of diligence, the procedural history of the case, the public interest served by the suit, and the risk of prejudice due to the delay. Judge Merritt stated that the judges on the Sixth Circuit's panel understood Judge Allen's frustration with the case and that they agreed with him that the performance of plaintiffs' several counsel was less than diligent and could not be excused. Nonetheless, the Sixth Circuit held that the dismissal was an extreme sanction that should be rarely used and cited as authority *Carter v. City of Memphis, Tennessee,* 636 F.2d 159 (6th Cir. 1980) and *Edsall v. Penn Central Transportation Co.,* 479 F.2d 33 (6th Cir. 1973), *cert. denied,* 414 U.S. 1040 (1973).

The Sixth Circuit also held that dismissal is inappropriate when lesser sanctions are available and cited *Chira v. Lockheed Aircraft Corp.,* 634 F.2d 664 (2nd Cir. 1980). The *Chira* opinion was authored by an eminent jurist, Judge Irving S. Kaufman. This case concerned a Lockheed lawyer who was fired and then sued his employer for wrongful termination. The district court affirmed the defendant's motion to dismiss under Rule 41(b) for failure to prosecute and the Second Circuit affirmed. Remarks by Judge Kaufman regarding the nature of a Rule

41(b) dismissal are insightful: "[t]he remedy is pungent, rarely used, and conclusive. A district judge should employ it only when he is sure of the impotence of lesser sanctions." *Chira* 665. Judge Kaufman reiterated in the decision that "[o]nly on rare occasions should a district judge deprive the languid litigant of his right to a trial on the merits. It is with reluctance that an appellate court will approve a dismissal with prejudice." *Id.* at 668. In the case before the Court the Sixth Circuit held that Judge Allen did not find that lesser sanctions were impotent. The Sixth Circuit properly concluded that the district judge could simply have scheduled a trial date to compel diligent performance by counsel and that this was the appropriate sanction.

A dismissal under Rule 41(b) is reversible only if an abuse of discretion has been shown. *Link v. Wabash R. R. Co., supra*; *Chira v. Lockheed Aircraft Corp., supra; The Citizens Utilities Co. v. American Telephone and Telegraph Co., supra; Anderson v. Air West, Inc.*, 542 F.2d 522 (9th Cir. 1976); *Alexander v. Pacific Maritime Association, supra.*

A court of appeals can find an abuse of discretion when it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a consideration of all the relevant factors. *Anderson v. Air West, Inc., supra; Alexander v. Pacific Maritime Association, supra; In Re Josephson*, 218 F.2d 174 (1st Cir. 1954); *States Steamship Co. v. Philippine Airlines*, 426 F.2d 803 (9th Cir. 1970).

In a Ninth Circuit case, *Pearson v. Dennison*, 353 F. 2d 24 (1965), Judge Duniway made insightful comments on the concept of abuse of discretion:

> We do not much like the term 'abuse' in this context. It has pejorative connotations not here appropriate. But it has become the customary word. Perhaps 'misuse' is milder. What we mean when we say that a court abused its discretion is merely that we think that it made a mistake. There are, however, cases in which the term abuse is appropriate. *Pearson* 28, n. 6.

The Sixth Circuit in its decision found that the district court made a clear error of judgment or a mistake because lesser sanctions were not considered, because dismissal would serve no purpose inasmuch as a new action would be filed (thus exacerbating the prejudice to the Petitioners caused by delay), because the Sixth Circuit concluded correctly that Respondents' counsel had spent a considerable amount of time on the case, and because at least some of the delay was attributable to difficulties beyond the control of counsel (excusable neglect regarding deposition transcription).

Other factors support the Sixth Circuit's reversal. There is a strong public policy of deciding cases on their merits and giving parties their day in court. This action has significant merit, particularly in light of the remedial nature of the 1934 Act and the implied causes of action that have arisen. *See Kardon v. National Gypsum Co.*, 69 F. Supp. 512 (E.D. Pa. 1946); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970); *Superintendent of Insurance v. Bankers Life and Casualty Co.*, 404 U.S. 619 (1971); *Herman and MacLean v. Huddleston*, 103 S. Ct. 683 (1983).

This case is a perfect example of Murphy's Law—what can go wrong will go wrong! This action involves complex securities litigation with a large group of defendants and a class action group of plaintiffs numbering ap-

proximately 1000 investors. Factors essentially beyond the control of the Respondents and their counsel have been operating to contribute to the delays, i.e., death of the original trial judge, moves by the representative plaintiff, business liquidation of the companies involved in issuing the securities, illness of prior counsel's wife, withdrawal of prior counsel Gudgel due to appointment to the bench, withdrawal of prior counsel Kegley due to new employment which triggered a conflict of interest,[5] deposition scheduling difficulties, deposition transcription problems due to the disappearance of the court reporter, and other problems ad infinitum. It is clear that this case is materially different from other cases involving dismissal because counsel for the Respondents have never engaged in outright disobedience or defiance of court orders. *See Link v. Wabash R. R. Co., supra* (Dismissal because counsel failed to appear at a pretrial conference ordered by the court); *Dowdell v. Sunshine Biscuits, Inc.,* 90 F.R.D. 107 (N.D. Ga. 1981), *aff'd.* 673 F.2d 1343 (11th Cir. 1982) (Total failure by counsel to prosecute and direct disobedience by counsel of court orders and instructions); *Thompson v. J.D. Fleming,* 402 F.2d 260 (5th Cir. 1968) (Dismissal because counsel refused to go to trial); *Chira v. Lockheed Aircraft Corp., supra* (Dismissal for noncompliance with a pretrial order and because counsel demonstrated complete intransigence in the face of clear court orders); *Edsall v. Penn Central Transportation Co., supra* (Dismissal for violation of a court order to try the

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[5] James A. Kegley formerly acted as counsel to Respondents. He left the law firm of Gess, Mattingly, Saunier & Atchison to join the firm of Greenebaum, Doll & McDonald. It should be noted that counsel to the Petitioner, Weleken Himmelfarb & Co., are members of Mr. Kegley's new firm.

case); *Nat. Hockey League v. Metro Hockey Club,* 427 U.S. 639 (1976) (Dismissal for failure to comply with court's discovery order); *Lyell Theater Corp. v. Loews Corp.,* 682 F.2d 37 (2nd Cir. 1982) (Dismissal because of several failures of counsel to obey court orders).

The Sixth Circuit Court of Appeals did not substitute its judgment with regard to the evaluation or assessment of the essential facts of the case. The Sixth Circuit merely instructed the district court to follow the law governing a Rule 41(b) dismissal indicating that the sanction was an extreme and rare one which should not be used when lesser sanctions are available that would be equally as effective.

The Court of Appeals recognized that the case involved competing equities and this was proper.

The Sixth Circuit concluded that Respondents' counsel spent a considerable amount of time on the case and was chargeable with excusable neglect only with regard to the securing of deposition transcripts. This conclusion is not inconsistent with the district court's decision and findings of fact.

The Sixth Circuit determined that dismissal would accomplish nothing because a new class would surely assert its rights in a new cause of action notwithstanding potential statute of limitations problems. A new class could withstand attack based on statute of limitations arguments pursuant to the tolling doctrine articulated by this Court in *American Pipe and Construction Co. v. Utah,* 94 S.Ct. 756 (1974). It was in this case that this Court held that a commencement of a class action suspends the applicable statute of limitations as to all asserted

members of the class who would have been parties had the suit been permitted to continue as a class action. This tolling principle was reaffirmed by this Court in *Crown, Cork and Seal Co., Inc. v. Parker,* 103 S.Ct. 2392 (1983) and again in *Chardon v. Soto,* 103 S.Ct. 2611 (1983). The Sixth Circuit correctly perceived that the Petitioners would only suffer more prejudice if the case were dismissed, not less. This is so because this litigation will not be terminated by dismissal, it will just begin anew.

In an unseemly attempt to create arguments for review by this Court, Petitioners have made several incorrect statements in their request for a writ of certiorari. The Sixth Circuit did not ignore the conduct of Respondents' counsel. Rather than substitute its own judgment, it did agree with the district court's characterization of the conduct of Respondents' counsel. The Petitioners are incorrect in stating that Judge Allen concluded that the Respondents' counsel did not spend a substantial amount of time on the case. Careful examination of Judge Allen's decision reveals that he did not so conclude. The Sixth Circuit did not hold that the Respondents could not be held responsible for the conduct of their chosen counsel. A careful reading of the decision of the Sixth Circuit does not lead one to such a holding.

The decision of the Sixth Circuit is completely consistent with this court's definitive analysis of Rule 41(b) in *Link v. Wabash R.R. Co., supra.* Moreover, it is clear that this Court's guidance in *Link* is sufficient for Rule 41(b) dismissals. Petitioners have made no compelling arguments to the contrary. Notwithstanding Petitioners' statements in their Petition, the Sixth Circuit did not determine that delays by Respondents' counsel were ex-

cusable and should not be attributed to the individual Respondent, Julia V. Sparrow Holt (Atchison). There is no language anywhere in the decision that could be interpreted as support for Petitioners' assertion. The Sixth Circuit referred only to the efforts to secure depositions when it categorized the conduct of counsel as "excusable neglect."

The decision of the Sixth Circuit is also in accord with the decisions of this court in *National Hockey League v. Metropolitan Hockey, Inc., supra* and *Curtiss-Wright Corp. v. General Electric Co.*, 446 U.S. 1 (1980). Although neither of these cases is directly in point because they involve Rules 37 and 54(b) respectively, they are relevant by analogy. This Court in *National Hockey League* indicated that the question, of course, is not whether this Court, or whether a court of appeals, would as an original matter have dismissed the action, but is whether the district court abused its discretion in so doing. This Court in *National Hockey League* also held that the district court must consider the entire record. The Sixth Circuit correctly applied the abuse of discretion standard because it noted that the district court did not explore all the alternatives to dismissal. This court in *Curtiss-Wright Corp.* determined that the standard of review granting a Rule 54(b) dismissal is whether or not the dismissal is in the interests of sound judicial administration. The Sixth Circuit correctly determined that the district court's dismissal was not in the interests of sound judicial administration because dismissal would not have accomplished anything. Dismissal would result in more delay and all the substantial effort to date in the litigation would be wasted. Such a waste is not consistent with efficient judicial administration.

The Petitioners misinterpret the law stated in *Carter v. City of Memphis, supra* and *Edsall v. Penn Central Transportation, Co., supra.* These decisions do not stand for a no-fault rule in favor of clients when faced with a dismissal under Rule 41(b) of the Federal Rules of Civil Procedure. In *Carter* the court cited *five* reasons for overturning the dismissal: (1) both attorneys were at fault, (2) the defendant was not prejudiced, (3) there was no indication that plaintiff's counsel would not have been ready for trial, (4) plaintiff's counsel had filed pleadings indicating his position, and (5) plaintiff was totally blameless. The decision did not turn on the responsibility of a plaintiff for the acts of his lawyer-agent. As noted *supra, Edsall* is materially different because counsel's conduct involved a direct violation of a court order. Nonetheless, the court properly held that the interests of justice sometimes require a finding of abuse of discretion because the balance of equities results in a conclusion that the injured party should be given his day in court. The Sixth Circuit likewise struck such a balance.

There is no authority and the Petitioners cite none for their proposition that "whereas, in other circuits a Rule 41(b) dismissal for failure to prosecute is generally upheld, the Sixth Circuit has consistently reversed Rule 41(b) dismissals granted for this reason." (*See* Petitioners' Petition at 30.)

Notwithstanding Petitioners' arguments in their Petition, the Sixth Circuit did not excuse the conduct of counsel on the basis that it was attributable in major part to commitment to other cases. There is no language in the Sixth Circuit's decision to support this argument.

The case before the court does not present any compelling reasons for review because the Sixth Circuit decision is not in conflict with the law of other circuits, because the Sixth Circuit's decision does not demonstrate unacceptable conduct requiring this Court's supervision, and because it is in full compliance with this Court's guidance on Rule 41(b) dismissals.

CONCLUSION

On the basis of the foregoing the Petition for a writ of certiorari herein should be denied.

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